

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JILL MARIE-KAPPUS SCHMID,

Plaintiff,

v.

DEPARTMENT OF THE ARMY, U.S.  
ARMY CORPS OF ENGINEERS,  
JOHN M. McHUGH, as Secretary of the  
Army, ROBERT L. VAN ANTWERP,  
as Commanding General and Chief of  
the U.S. Army Corps of Engineers,

Defendants.

NO: CV-11-5042-RMP

ORDER GRANTING  
DEFENDANTS' MOTIONS TO  
DISMISS AND FOR SUMMARY  
JUDGMENT

BEFORE the Court are the Defendants' motions to dismiss and for summary judgment, ECF Nos. 56, 64. The Court has reviewed the motions, memoranda, statements of material facts, the declarations, attachments to documents, the amended complaint, all other relevant filings, and is fully informed. The Court has had the benefit of oral argument on these motions.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR  
SUMMARY JUDGMENT ~ 1

**BACKGROUND**

Plaintiff Jill Marie-Kappus Schmid is an attorney formerly employed by Defendant United States Army Corps of Engineers (“Corps”). ECF No. 120 at 3-5. Ms. Schmid was hired by the Corps in 2006 as Assistant District Counsel in the Corps’ Walla Walla District Office. ECF No. 120 at 4-5. Part of Ms. Schmid’s role as Assistant District Counsel was to provide legal analysis on environmental assessments and compliance obligations. ECF No. 120 at 6. In performing her job, Ms. Schmid worked alongside Benjamin Tice. Mr. Tice is a biologist who began working for the Corps in 1995. ECF No. 120 at 9.

The record evidences no problematic events between Mr. Tice and Ms. Schmid until 2009. On June 24, 2009, Mr. Tice sent an email to Lt. Col. Michael Farrel, Commander of the Corps’ Walla Walla District. ECF No. 120 at 15. Mr. Tice carbon copied other parties on the email, including Ms. Schmid. ECF No. 120 at 15. The email was so out of character for Mr. Tice, that Mr. Tice’s co-workers were concerned for him. ECF No. 120 at 16. For example, in the email, Mr. Tice urges the readers of the email to “Read MY suicide training document. Come see MY hands!” and expresses his desire to “explain this to my Angels. I have a list. It doesn’t contain all of them, just enough to let me be understood.” ECF No. 67 at 223. In the email, Mr. Tice describes Ms. Schmid as his “most

1 special Angel right now. I so PRAY she is safe. She has to be CRAZY. I MUST  
2 be CRAZY!” ECF No. 67 at 223.

3 As a result of the email, Mr. Tice was asked to leave the Walla Walla office,  
4 and a decision was made to keep him away from the office until he was medically  
5 cleared. ECF No. 120 at 19-21. Mr. Tice visited St. Mary’s Medical Center in  
6 Walla Walla, Washington, where he was diagnosed with bi-polar disorder. ECF  
7 No. 120 at 19. However, two days later, and while still in a heightened mental  
8 state, Mr. Tice returned to his workplace, seeking to find out why he had been  
9 asked to leave on June 24. ECF No. 120 at 20. Deputy Director Alan Feistner and  
10 Security Officer Dave Raappana spoke with Mr. Tice and explained that he needed  
11 to be medically evaluated before he could return to work. ECF No. 120 at 22.

12 Mr. Tice remained outside his workplace for some time after his  
13 conversation with Mr. Feistner and Mr. Raappana. During that time Ms. Schmid  
14 and other employees went out to speak with Mr. Tice. ECF No. 120 at 23-25. Mr.  
15 Feistner eventually returned with a formal letter advising Mr. Tice of the need to  
16 be medically cleared before returning to work. ECF No. 120 at 25. Additionally,  
17 police were summoned after it became clear that Mr. Tice would not leave. ECF  
18 No. 144 at 45. After speaking with the police, Mr. Tice was escorted away from  
19 his work and driven home by two of his co-workers. ECF No. 144 at 45.

1 On June 29, 2009, Mr. Tice voluntarily entered the Lourdes Counseling  
2 Center (“Lourdes”) in Kennewick, Washington. ECF No. 120 at 26. He remained  
3 for in-patient treatment at Lourdes for one week. ECF No. 120 at 26. Dr. R. A.  
4 Johnson, M.D., a psychiatrist at Lourdes, diagnosed Mr. Tice with bi-polar  
5 disorder. ECF No. 120 at 26. Dr. Johnson released Mr. Tice to return to work on  
6 July 22, 2009. ECF No. 120 at 26.

7 Mr. Tice returned to work on July 22, 2009. ECF No. 120 at 27. After Mr.  
8 Tice returned, he continued to call Ms. Schmid, send her emails, pass notes, and  
9 make personal visits to Ms. Schmid’s work area. ECF No. 120 at 28. In early  
10 August, Ms. Schmid went to her supervisor, Linda Kirts. ECF No 120 at 28. Ms.  
11 Schmid “expressed to [Kirts] her concerns with things [concerning Tice],” and told  
12 Ms. Kirts that “she was uncomfortable, that [Tice] was communicating with her in  
13 ways that she didn’t want and she wanted it to stop.” ECF No. 120 at 28  
14 (alteration in original) (internal quotations omitted).

15 In early August 2009, Mr. Tice ran out of one of his medications. ECF No.  
16 120 at 30. A report from Lourdes, signed on September 4, 2009, suggests that Mr.  
17 Tice’s behavior began to deteriorate by August 11, 2009. ECF No. 67-1 at 289-  
18 294. By August 15, 2009, Mr. Tice’s wife noticed that Mr. Tice had run out of his  
19 medication. ECF No. 120 at 32-33. On August 17, 2009, Mr. Tice’s wife called  
20 Dr. Johnson and received a new prescription with instructions that Mr. Tice should

1 immediately take a double dose. ECF No. 120 at 32-33. Mr. Tice only took a  
2 single dose of his medication. ECF No. 120 at 33.

3 During the week of August 17, 2009, Mr. Tice's co-workers reported to Mr.  
4 Tice's supervisor that his behavior had changed. ECF No. 120 at 31-32. On  
5 August 18, 2009, Mr. Tice gave Ms. Schmid a letter containing a riddle and a  
6 prediction related to a shoreline management project they were working on  
7 together. ECF No. 67 at 270-273. Mr. Tice exhibited further odd behavior over  
8 the course of August 19, 2009, culminating in a conversation with his supervisor.  
9 ECF No. 120 at 34. Mr. Tice's supervisor then spoke with human resources about  
10 monitoring Mr. Tice. ECF No. 120 at 35. Mr. Tice's supervisor also called Mr.  
11 Tice's wife to request that she set up a meeting for Mr. Tice with Dr. Johnson that  
12 evening, which Mr. Tice did not attend. ECF No. 120 at 36.

13 Mr. Tice left work on August 19, 2009, at 3:00 p.m. ECF No. 120 at 37.  
14 Later that evening, Mr. Tice traveled to his stepdaughter's home. ECF No. 120 at  
15 37. While there, Mr. Tice was incoherent and rambling and reported that voices  
16 were telling him that someone had to die. ECF No. 120 at 37. Mr. Tice suggested  
17 that maybe he should commit suicide and suggested at various times killing his  
18 wife, family members, and neighbor. ECF No. 120 at 39-40. Mr. Tice also  
19 expressed an interest in killing Ms. Schmid. ECF No. 120 at 38-40.

1 Mr. Tice also stated that he loved Ms. Schmid, and that Ms. Schmid needed  
2 to go with him to God. ECF No. 120 at 39. A note was found in Mr. Tice's  
3 vehicle which stated that he wanted himself and Ms. Schmid to die nine days apart.  
4 ECF No. 120 at 38, 41. The vehicle also contained ammunition for a firearm.  
5 ECF No. 120 at 38. Walla Walla Police took Mr. Tice into custody on a mental  
6 health concern. ECF No. 120 at 40-41. Ms. Schmid was aware of the death threat.  
7 ECF No. 120 at 41-42.

8 Mr. Tice was involuntarily committed to Lourdes on August 20, 2009. Ms.  
9 Schmid applied for and received an ex parte temporary restraining order restricting  
10 Mr. Tice from coming within 500 feet of her. ECF No. 120 at 48. Ms. Schmid and  
11 her husband left the Walla Walla area for the weekend, and Ms. Schmid was given  
12 administrative leave for the following week. ECF No. 120 at 52. On August 27,  
13 2009, Mr. Tice mailed a letter to a co-worker for delivery to Ms. Schmid. ECF No.  
14 120 at 48. That co-worker turned the letter over to Corps' security officers, who  
15 provided the letter to Commander Ferrell. ECF No. 120 at 53. At Plaintiff's  
16 insistence, Commander Ferrell turned the letter over to her. ECF No. 120 at 55.

17 Mr. Feistner sent an email to all staff directing them to use their badges to  
18 enter the building and only enter through the front door. ECF No. 120 at 55-56.  
19 Other security precautions were taken to ensure building security should Mr. Tice  
20 appear. ECF No. 120 at 57-58.

1 On September 1, 2009, Mr. Tice was released from his commitment after a  
2 review hearing. ECF No. 120 at 58. Prior to his release, Mr. Tice's medical  
3 providers found that Mr. Tice was no longer acutely manic and no longer had  
4 suicidal or homicidal ideation. ECF No. 120 at 60.

5 Even though Mr. Tice was released, the reviewing court found that Mr. Tice  
6 presented a likelihood of serious harm to himself and others. ECF No. 120 at 59.  
7 The court ordered that Mr. Tice continue to take his medications, attend outpatient  
8 mental health appointments, refrain from threatening or harming others, and refrain  
9 from drugs and alcohol. ECF No. 120 at 59. In addition, Mr. Tice's medical  
10 providers noted a risk of relapse. ECF No. 120 at 60.

11 On September 4, 2009, Mr. Tice attended a court hearing in which Ms.  
12 Schmid sought an anti-harassment order. ECF No. 120 at 60-61. The court  
13 entered a two-year order restraining Mr. Tice from coming within 500 feet of Ms.  
14 Schmid's home or contacting Ms. Schmid. ECF No. 120 at 60. However, Mr.  
15 Tice was only restricted from coming within twenty feet of Ms. Schmid at his and  
16 Ms. Schmid's shared workplace. ECF No. 120 at 60-61. When the anti-harassment  
17 order was entered, Mr. Tice was still on administrative and medical leave. ECF  
18 No. 120 at 62.

19 On September 17, 2009, Commander Farrell ordered that an Army  
20 Regulation ("AR") 15-6 investigation be conducted to investigate the threats made

1 by Mr. Tice against Ms. Schmid. ECF No. 120 at 64. The purpose of the  
2 investigation was to determine what disciplinary or corrective action needed to be  
3 taken. ECF No. 120 at 65-66. The AR 15-6 investigation concluded that Mr. Tice  
4 did not have an intent to kill anyone on the night of August 19, 2009. ECF No. 67  
5 at 44.

6 On September 18, 2009, the Corps granted Ms. Schmid a telework  
7 agreement that was initially slated to end October 23, 2009, but was extended until  
8 January 11, 2010. ECF No. 120 at 72-73. Ms. Schmid worked remotely from a  
9 home in Arizona that she shared with her cousin. ECF No. 120 at 72-73.

10 On October 26, 2009, Dr. Johnson cleared Mr. Tice to return to work. ECF  
11 No. 120 at 73. However, Dr. Johnson also informed Commander Farrell that Mr.  
12 Tice could possibly relapse. ECF No. 120 at 74. The Corps approved Mr. Tice's  
13 return to work on November 23, 2009. ECF No. 120 at 74-75. The Corps placed  
14 Mr. Tice at an annex that was five miles away from the main building. ECF No.  
15 120 at 74-75.

16 Commander Farrell also imposed a two-week suspension on Mr. Tice,  
17 issued on January 5, 2010. ECF No. 120 at 79-80. Mr. Tice served his suspension  
18 from January 24, 2010, to February 6, 2010. Mr. Tice returned to the main Walla  
19 Walla building on February 9, 2010. ECF No. 120 at 82, 84-85. The Corps tried  
20 to accommodate Mr. Tice's compliance with Ms. Schmid's anti-harassment order

1 by limiting Mr. Tice's parking and entry options into the building and by taking  
2 other steps to avoid having Mr. Tice and Ms. Schmid come into direct contact.  
3 ECF No. 120 at 83.

4 As a result of Mr. Tice's presence in Walla Walla, Ms. Schmid could not go  
5 to the offices of some of her co-workers who served on development teams with  
6 her because Mr. Tice's office was near theirs. ECF No. 120 at 85. Ms. Schmid  
7 asserts that she was not invited to meetings because Mr. Tice would be present.  
8 ECF No. 120 at 86. Ms. Schmid identified meeting exclusions as beginning in  
9 January 2010. ECF No. 121 at 19-20. In addition, Mr. Tice's presence in the  
10 building caused Ms. Schmid emotional distress that was apparent to her coworkers.  
11 ECF No. 120 at 87.

12 On February 16, 2010, Ms. Schmid filed a complaint with an Equal  
13 Employment Opportunity ("EEO") counselor. ECF No. 121 at 343. In the EEO  
14 complaint, Ms. Schmid alleged gender discrimination based on the return of Mr.  
15 Tice. ECF No. 121 at 344. The EEO complaint states that Ms. Schmid "seeks at a  
16 minimum transfer to another district and costs associated with moving to include  
17 sale of house [sic], and Permanent Change of Station (PCS) to resolve the issue."  
18 ECF No. 121 at 344.

19 In March of 2010, Ms. Schmid requested a transfer to a different Corps  
20 office from her supervisors. ECF No. 120 at 88-89. Ms. Schmid was transferred

1 to the Portland Oregon District on April 12, 2010. ECF No. 120 at 88-89. Upon  
2 first arriving in Portland, Ms. Schmid alleges that she was berated by a Lieutenant  
3 Colonel who repeatedly asked why she had moved from the Walla Walla  
4 Department. ECF No. 120 at 89. That same Lieutenant Colonel revealed later that  
5 same day that he knew why she had sought a transfer. ECF No. 120 at 89. Ms.  
6 Schmid alleges that she was treated “differently” at the Portland Department  
7 because everyone there knew what had happened in Walla Walla. ECF No. 120 at  
8 89. While in Portland, Ms. Schmid was even asked to negotiate the rental of an  
9 inflatable play area for a Corps social event. ECF No. 69 at 689. Ms. Schmid  
10 resigned from the Corps on July 28, 2010. ECF No. 120 at 92-93.

### 11 SUMMARY JUDGMENT STANDARD

12 Summary judgment is appropriate “if the movant shows that there is no  
13 genuine dispute as to any material fact and the movant is entitled to judgment as a  
14 matter of law.” Fed. R. Civ. P. 56(a). A key purpose of summary judgment “is to  
15 isolate and dispose of factually unsupported claims . . . .” *Celotex Corp. v. Catrett*,  
16 477 U.S. 317, 323-24 (1986). Summary judgment is “not a disfavored procedural  
17 shortcut,” but is instead the “principal tool[ ] by which factually insufficient claims  
18 or defenses [can] be isolated and prevented from going to trial with the attendant  
19 unwarranted consumption of public and private resources.” *Celotex*, 477 U.S. at  
20 327.

1 The moving party bears the initial burden of demonstrating the absence of a  
2 genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The moving party  
3 must demonstrate to the Court that there is an absence of evidence to support the  
4 non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then  
5 shifts to the non-moving party to “set out ‘specific facts showing a genuine issue  
6 for trial.’” *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

7 A genuine issue of material fact exists if sufficient evidence supports the  
8 claimed factual dispute, requiring “a jury or judge to resolve the parties' differing  
9 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
10 *Ass’n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws  
11 all reasonable inferences in favor of the nonmoving party. *Dzung Chu v. Oracle*  
12 *Corp. (In re Oracle Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing  
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The evidence  
14 presented by both the moving and non-moving parties must be admissible. Fed. R.  
15 Civ. P. 56(e). The court will not presume missing facts, and non-specific facts in  
16 affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat’l*  
17 *Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 18 DISCUSSION

19 In her first amended complaint, ECF No. 18, Ms. Schmid alleges four causes  
20 of action under Title VII and three causes of action through the Federal Tort

1 Claims Act (“FTCA”). Under Title VII, Ms. Schmid alleges actions for (1)  
2 constructive discharge; (2) disparate treatment; (3) retaliation; and (4) sexual  
3 harassment / hostile work environment. Under the FTCA, Ms. Schmid alleges  
4 actions for (1) negligent supervision and retention; (2) negligent infliction of  
5 emotional distress; and (3) intentional infliction of emotional distress.

### 6 **Claims Under Title VII**

7 The proper legal framework for considering a grant of summary judgment  
8 on a Title VII claim is established in *McDonnell Douglas Corp. v. Green*, 411 U.S.  
9 792 (1973). *Viliarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir.  
10 2002). Under that framework, the plaintiff must first establish a prima facie case  
11 of discrimination. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). The level of  
12 proof required to meet this standard “‘is minimal and does not even need to rise to  
13 the level of a preponderance of the evidence.’” *Id.* (quoting *Wallis v. J.R. Simplot*  
14 *Co.*, 26 F.3d 885, 889 (9th Cir. 1994)).

15 Where a plaintiff establishes a prima facie showing of discrimination, the  
16 defendant has the burden of production “to articulate some legitimate,  
17 nondiscriminatory reason for the challenged action.” *Id.* (citing *McDonnell*  
18 *Douglas*, 411 U.S. at 802). Where an employer provides a nondiscriminatory  
19 reason, the plaintiff must show that the reason is pretextual “‘either directly by  
20 persuading the court that a discriminatory reason more likely motivated the

1 employer or indirectly by showing that the employer's proffered explanation is  
2 unworthy of credence.'" *Id.* (quoting *Chuang v. Univ. of Cal. Davis*, 225 F.3d  
3 1155, 1123 (9th Cir. 2000)). "Although a plaintiff may rely on circumstantial  
4 evidence to show pretext, such evidence must be both specific and substantial." *Id.*  
5 (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)).

### 6 ***Proper Party***

7 As an initial matter, Defendants argue that the Department of the Army, the  
8 Army Corps of Engineers, and Robert L. Van Antwerp must be dismissed from  
9 this action because the proper defendant in a Title VII is the head of the  
10 department, agency, or unit that employed the plaintiff. 42 U.S.C. § 2000e-16(c).  
11 Defendants agree that John M. McHugh, as Secretary of the Army, is a proper Title  
12 VII defendant. Ms. Schmid argues that both Mr. McHugh and Mr. Antwerp, as  
13 Commanding General in Chief of the Corps, are proper under Title VII. However,  
14 the proper defendant in a Title VII suit against the Corps is the Secretary of the  
15 Army. *Smith v. United States Army Corps of Engineers*, 829 F. Supp. 2d 176, 183  
16 (W.D.N.Y. 2011). Accordingly, all Title VII claims against the Corps, the  
17 Department of the Army, and Mr. Antwerp are dismissed.

### 18 ***Constructive Discharge***

19 "Constructive discharge occurs when, 'looking at the totality of the  
20 circumstances, a reasonable person in [the employee's] position would have felt

1 that he was forced to quit because of intolerable and discriminatory working  
2 conditions.”” *Wallace v. City of San Deigo*, 479 F.3d 616, 625 (9th Cir. 2006)  
3 (alteration in original) (internal quotations omitted) (quoting *Watson v. Nationwide*  
4 *Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)). “The determination whether  
5 conditions were so intolerable and discriminatory as to justify a reasonable  
6 employee’s decision to resign is normally a factual question left to the trier of  
7 fact.” *Watson*, 823 F.2d at 361. Generally, a single isolated incident is not  
8 sufficient to establish constructive discharge, and a plaintiff must establish “some  
9 aggravating factors, such as a continuous pattern of discriminatory treatment” to  
10 support a claim for constructive discharge. *Schnidrig v. Columbia Mach. Inc.*, 80  
11 F.3d 1406, 1411-12 (9th Cir. 1996) (quoting *Sanchez v. City of Santa Ana*, 915  
12 F.2d 424, 431 (9th Cir. 1990)).

13 Ms. Schmid argues that a threat of physical harm is sufficient, even as an  
14 isolated incident, to support a finding of constructive discharge. She asserts that  
15 the evidence in the record creates an issue of fact as to whether such a threat  
16 occurred here. However, even taking her proposition as true, the relevant time  
17 frame for determining whether working conditions have become so intolerable as  
18 to constitute a constructive discharge is at the time of the plaintiff’s resignation.  
19 *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994); *see*  
20 *also Torrech-Hernandez v. General Elec. Co.*, 519 F.3d 41, 50 (1st Cir. 2008).

1 Ms. Schmid resigned on July 28, 2010. Her resignation came slightly more  
2 than three months from the date she transferred to the Portland office, eight months  
3 after Mr. Tice had returned to work at the Walla Walla District Office, nearly a  
4 year after Mr. Tice's threats, and over a year after Mr. Tice's sending of the  
5 "Angels" email. Given the long stretches of time in which Ms. Schmid tolerated  
6 her working conditions, the Court finds that a reasonable fact finder could not  
7 conclude that those conditions were intolerable.

8 With regard to the conditions in Portland, Ms. Schmid testified during her  
9 deposition that she was berated upon first arriving in Portland by a Lieutenant  
10 Colonel who asked her why she had transferred to Portland and that the same  
11 Lieutenant Colonel shortly thereafter revealed to Ms. Schmid in an elevator that he  
12 knew why she had transferred. Other than the incidents with the Lieutenant  
13 Colonel, the only issues Ms. Schmid had with the Portland office were that she had  
14 been assigned the duty of organizing the rental of an inflatable play area for a  
15 company picnic, which she felt was a menial task, and that she was uncomfortable  
16 with everyone in her department knowing why she had transferred to Portland,  
17 which she alleges caused them to treat her differently. ECF No. 69 at 689. Ms.  
18 Schmid noted that although Mr. Tice had been to the Portland office before, he did  
19 not travel to the Portland office during her time there. ECF No. 69 at 688.

1 Therefore, Ms. Schmid has failed to present any evidence of intolerable conditions  
2 in the Portland office.

3 In short, Ms. Schmid has presented no aggravating factors establishing that,  
4 at the time that she resigned, conditions were so intolerable that she was forced to  
5 resign. Ms. Schmid continued her employment both after Mr. Tice's bizarre and  
6 threatening behavior in Walla Walla and after her initial interaction with the  
7 Lieutenant Colonel in Portland. The only negative factor that Ms. Schmid alleges  
8 existed at the time that Ms. Schmid resigned was that she was treated differently by  
9 her coworkers because of the nature of her transfer from Walla Walla.

10 Taking the evidence in the light most favorable to Ms. Schmid, a reasonable  
11 fact finder could not find that a reasonable person in her position would have felt  
12 compelled to quit. Accordingly, Defendants are entitled to summary judgment on  
13 Ms. Schmid's constructive discharge claim.

#### 14 ***Disparate Treatment***

15 To establish a prima facie case for disparate treatment under Title VII, "a  
16 plaintiff must demonstrate that: (1) [she] belonged to a protected class; (2) [she]  
17 was qualified for [her] job; (3) [she] was subjected to an adverse employment  
18 action; and (4) similarly situated employees not in [her] protected class received  
19 more favorable treatment." *Athoine v. N. Cent. Cnty. Consortium*, 605 F.3d 740,  
20 753 (9th Cir. 2010) (citing *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006)).

1           It is uncontested that Ms. Schmid, as a woman, belongs to a protected class  
2 and that she was qualified for her job. Accordingly, the only issues on summary  
3 judgment as to Ms. Schmid's disparate treatment claim are whether she was  
4 subject to an adverse employment action and whether a similarly situated  
5 employee outside of Ms. Schmid's protected class received more favorable  
6 treatment.

7           In the context of Title VII, employees are "similarly situated" for the  
8 purposes of *McDonnell Douglas* where "they have similar jobs and display similar  
9 conduct." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)  
10 (citing *Ward v. Procter & Gamble Paper Prods. Co.*, 111 F.3d 558, 560-61 (8th  
11 Cir. 1997)). Whether an employee is similarly situated is ordinarily a question of  
12 fact. *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d  
13 874, 885 n.5 (9th Cir. 2007) (citing *George v. Leavitt*, 407 F.3d 405, 414-15 (D.C.  
14 Cir. 2005)).

15           Ms. Schmid argues that she and Mr. Tice were similarly situated for the  
16 purposes of Title VII and that Mr. Tice, who is outside of Ms. Schmid's protected  
17 class, was treated more favorably than her. Ms. Schmid's argument focuses on the  
18 fact that Mr. Tice and Ms. Schmid both worked as a team in the environmental  
19 compliance division of the Corps. Therefore, Plaintiff argues, despite the fact that  
20

1 Mr. Tice is a biologist with a different title and pay than Ms. Schmid, an attorney,  
2 the two are similarly situated.

3 However, even if the Court were to accept the premise that Ms. Schmid and  
4 Mr. Tice occupied a similar position, to be similarly situated employees must also  
5 engage in similar material conduct. *Vasquez*, 349 F.3d at 641. The conduct of the  
6 parties becomes particularly important where the alleged disparate treatment flows  
7 as a consequence of the employees' conduct. *E.g. Ward*, 111 F.3d at 561 (holding  
8 that two employees were not similarly situated because of their differing levels of  
9 physical escalation of an argument). In this case, all of Ms. Schmid's alleged  
10 adversary employment actions flow from Mr. Tice's threatening behavior.

11 Ms. Schmid and Mr. Tice worked without incident from 2006 until June of  
12 2009 when Mr. Tice sent the "Angels" email. Shortly thereafter, Mr. Tice was  
13 diagnosed with bi-polar disorder, and it was not very long after the diagnosis that  
14 the situation deteriorated further, ultimately leading to Mr. Tice's death threats and  
15 civil commitment to a mental institution.

16 After the June and August 2009 events, the Corps was well aware of Mr.  
17 Tice's mental health diagnosis. Both the mental health and conduct differences  
18 between Ms. Schmid and Mr. Tice were material to the decisions made by the  
19 Corps. For example, the Corps waited until a mental health professional cleared  
20 Mr. Tice to return to work before the Corps allowed him back. Similarly, the

1 Corps took measures to prevent contact between Mr. Tice and Ms. Schmid, given  
2 the death threats that he had made.

3 Because Mr. Tice's mental health diagnosis and conduct were relevant to the  
4 Corps' decisions, and because Ms. Schmid did not engage in similar conduct or  
5 possess similar mental health diagnoses, the parties were not similarly situated in a  
6 way that was material to the Corps' decisions. As a result, the different treatment  
7 that Mr. Tice and Ms. Schmid received cannot give rise to an inference that the  
8 discrimination was gender-based. Ms. Schmid has provided no evidence of other  
9 circumstances that give rise to an inference that any adverse employment effects  
10 suffered by Ms. Schmid were based on her gender.

11 As the Court concludes that Ms. Schmid has failed to present evidence of a  
12 similarly situated employee receiving more favorable treatment or of gender based  
13 disparate treatment, the Court does not reach the issue of whether Ms. Schmid has  
14 presented sufficient evidence to establish that she suffered an adverse employment  
15 action for purposes of her disparate treatment claim. Ms. Schmid has failed to  
16 establish a prima facie case of disparate treatment based on her gender and  
17 Defendants are entitled to summary judgment on that claim.

18 ***Retaliation***

19 "To make out a prima facie case of retaliation, an employee must show that  
20 (1) [she] engaged in a protected activity; (2) [her] employer subjected [her] to an

1 adverse employment action; and (3) a causal link exists between the protected  
2 activity and the adverse action.” *Ray*, 217 F.3d at 1240 (citing *Steiner v. Showboat*  
3 *Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994)). Both filing a complaint with  
4 the Equal Employment Opportunity Commission and filing an informal complaint  
5 with a supervisor can qualify as protected activities. *Ray*, 217 F.3d at 1240 n.3.  
6 For the purposes of a retaliation claim, the standard for showing an adverse  
7 employment action is lower than for disparate treatment claims under Title VII. In  
8 a retaliation case, the challenged action must be “materially adverse” which means  
9 the action might well have “dissuaded a reasonable worker from making or  
10 supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. Co.*, 548  
11 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir.  
12 2006)).

13 The parties agree that Ms. Schmid’s February 16, 2010, EEO complaint  
14 qualifies as a protected activity for the purposes of Title VII. However, Ms.  
15 Schmid argues that she has a protected activity date that arises earlier than the  
16 February 16, 2010, EEO complaint. Ms. Schmid asserts that she made earlier  
17 complaints to her supervisors about Mr. Tice. ECF No. 119 at 17. In support of  
18 her claim, Ms. Schmid cites to the deposition testimony of her supervisor Linda  
19 Kirts.

1 Ms. Kirts's deposition testimony evidences that Plaintiff came to her in  
2 August of 2009 after Mr. Tice's initial return to work following the "Angels" letter  
3 but prior to the August 19, 2009, death threats. Ms. Kirts testified that Ms. Schmid  
4 "said that she was uncomfortable, that [Mr. Tice] was communicating with her in  
5 ways that she didn't want, and she wanted it to stop." ECF No. 121 at 79. Ms.  
6 Kirts suggested that Ms. Schmid should tell Mr. Tice to stop emailing her and  
7 talking to her. ECF No. 121 at 79. Ms. Kirts testified that she never reviewed the  
8 emails that Mr. Tice was sending to Ms. Schmid, nor was she aware of whether  
9 Mr. Tice's phone calls to Ms. Schmid had become more frequent. ECF no. 121 at  
10 79-80.

11 Nowhere in Ms. Kirts's testimony does she suggest that Ms. Schmid  
12 communicated that Mr. Tice's harassment or unwanted communication were  
13 gender-based. In fact, when Ms. Kirts references Mr. Tice's conduct more  
14 generally she states that neither she nor Ms. Schmid believed Mr. Tice's conduct to  
15 comprise sexual harassment.<sup>1</sup> ECF No. 121 at 89, 91.

16 By early August, Mr. Tice had sent the "Angels" email, had appeared at  
17 work without being allowed inside, and had returned to work in late July. None of  
18 the specific conduct alleged to have occurred during this time gives rise to an  
19

---

20 <sup>1</sup>Under Ninth Circuit case law, a hostile work environment is one form of  
sexual harassment. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991).

1 inference that gender is at issue or that Ms. Kirts or the Corps should have been on  
2 notice that Ms. Schmid's August complaint was about gender discrimination.  
3 While the "Angels" email refers to Ms. Schmid as Mr. Tice's "most special Angel  
4 right now," the subsequent list purporting to identify possible "Angels" lists both  
5 men and woman as candidates. ECF No. 67 at 223. It is not until after the events  
6 of August 19, 2009, that the materials reference Mr. Tice's love for Ms. Schmid  
7 and his dreams of marriage and children. ECF No. 120 at 31, 39, 54.

8 Title VII prohibits retaliation for opposing discriminatory practices. 42  
9 U.S.C. § 2000e-3(a). In order for an informal complaint about co-worker conduct  
10 to a supervisor can constitute a protected activity, the report must put the  
11 supervisor on notice that the offending conduct constitutes unlawful  
12 discrimination, such as gender discrimination. *E.g. Jamal v. Wilshire Mgmt.*  
13 *Leasing Corp.*, 320 F. Supp. 2d 1060, 1078-79 (D. Or. 2004) (holding that  
14 plaintiff's failure to identify that complaints of harassment were based on race  
15 meant that the complaints were not "protected activities" for the purposes of Title  
16 VII).

17 The record before the Court provides insufficient evidence for a finder of  
18 fact to conclude that Ms. Schmid's August 2009 complaint to Ms. Kirts put the  
19 Corps on notice that Ms. Schmid was complaining about gender discrimination.  
20

1 As a result, Ms. Schmid's August 2009 complaint is not a protected activity for the  
2 purposes of Title VII.

3 In light of the foregoing, the earliest protected activity evidenced in the  
4 record is Ms. Schmid's February 16, 2010, EEO complaint. Ms. Schmid argues  
5 that she suffered the following adversary employment actions: (1) failure of her  
6 employer to provide her timely information and return her calls during her time  
7 teleworking; (2) her employer's retention and placement of Mr. Tice at the Walla  
8 Walla District Office; (3) Ms. Schmid's exclusion from meetings; (4) Ms.  
9 Schmid's transfer; and (5) Ms. Schmid's leaving her employment.

10 The first three adversary actions alleged by Ms. Schmid occurred before her  
11 EEO complaint was made or were ongoing at the time of the complaint and cannot  
12 serve as a basis for retaliation, ECF Nos. 120 at 72-73, 74-75, 82, 84-85; 121 at 19-  
13 20. *See Miller v. Fairchild Indus. Inc.*, 797 F.2d 727, 731 n.1 (9th Cir. 1986). The  
14 Court already has determined that Ms. Schmid has failed to present sufficient  
15 evidence to establish constructive discharge. Therefore, Ms. Schmid's termination  
16 was her own choice and not a retaliatory action.

17 The sole action that arguably could be an adverse action supporting a claim  
18 for retaliation is Ms. Schmid's transfer to Portland. However, in her EEO  
19 complaint, Ms. Schmid actually requested a transfer, albeit with moving expenses  
20 paid, as a remedy to her allegedly discriminatory environment. ECF No. 121 at

1 344. Ms. Schmid also separately asked the Corps for a transfer away from the  
2 Walla Walla District Office. As a result, no reasonable fact finder could find that  
3 the partial satisfaction of Ms. Schmid's EEO complaint or the granting of her  
4 transfer request somehow was the Corps' retaliatory action because of Ms.  
5 Schmid's complaint.

6 The Court finds that there has not been sufficient evidence to find that Ms.  
7 Schmid suffered an adverse action on the basis of retaliation. In short, Ms. Schmid  
8 has failed to provide sufficient evidence to support a prima facie case of retaliation.  
9 Accordingly, Defendants are entitled to summary judgment on this claim.

#### 10 ***Sexual Harassment / Hostile Work Environment***

11 To establish a prima facie case for a hostile work environment claim, a  
12 plaintiff "must show 'that (1) she was subjected to verbal or physical conduct of a  
13 sexual nature, (2) this conduct was unwelcome, and (3) that the conduct was  
14 sufficiently severe or pervasive to alter the conditions of the victim's employment  
15 and create an abusive working environment.'" *Craig v. M & O Agencies, Inc.*, 496  
16 F.3d 1047, 1055 (9th Cir. 2007) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522,  
17 1527 (9th Cir. 1995)).

18 In determining whether a hostile work environment exists, a court looks "to  
19 'all the circumstances,' including 'the frequency of the discriminatory conduct, its  
20 severity; whether it is physically threatening or humiliating, or a mere offensive

1 utterance; and whether it unreasonably interferes with an employee's work  
2 performance.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002)  
3 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). To establish  
4 employer liability for a hostile work environment, a plaintiff must show either that  
5 the conduct comprising the hostile work environment was committed by a  
6 supervisor or that the conduct was committed by a co-worker, the employer knew  
7 or should have known of the conduct, and the employer failed to take adequate  
8 steps to address the conduct. *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th  
9 Cir. 2001).

10 As an initial matter, Defendants argue that the relevant time period to  
11 consider in determining whether Plaintiff has provided sufficient evidence to  
12 establish a prima facie case for a hostile work environment claim is from January  
13 1, 2010, until the end of Ms. Schmid's employment. Defendants' argument relies  
14 on the fact that before a plaintiff may bring a Title VII claim, the plaintiff must  
15 exhaust her administrative remedies. *Kraus v. Presidio Trust Facilities*  
16 *Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009) (citing *Brown*  
17 *v. Gen. Servs. Admin.*, 425 U.S. 820, 829-30 (1976)).

18 Federal employees are required to bring their claims before an EEO  
19 Counselor "within 45 days of the date of the matter alleged to be discriminatory."  
20 *Id.* (quoting 29 C.F.R. § 1614.105(a). Although the time limit is contained within

1 a regulation, “failure to comply with this regulation has been held to be fatal to a  
2 federal employee’s discrimination claim.” *Lyons v. England*, 307 F.3d 1092, 1105  
3 (9th Cir. 2002). Where the acts supporting discrimination claims are discrete,  
4 application of Title VII’s time limit is simple: a party must consult with their EEO  
5 counselor within the forty-five days from the date of the discrete event or lose the  
6 ability to recover under Title VII. *Cherosky v. Henderson*, 330 F.3d 1243, 1245-46  
7 (9th Cir. 2003). However, hostile work environment claims are not discrete.  
8 *Morgan*, 536 U.S. at 115.

9 In *Morgan*, the Supreme Court directly addressed the timeliness of a Title  
10 VII hostile work environment claim. The Court reasoned that hostile environment  
11 claims by “[t]heir very nature involve[] repeated conduct,” and that such claims  
12 may rely on events comprising the claim that fall outside the Title VII time period.  
13 *Morgan*, 536 U.S. at 117. However, hostile work environment claims are not  
14 exempt from the administrative exhaustion requirement, and at least one act giving  
15 rise to the claim must occur within the relevant filing period. *Id.*

16 Ms. Schmid filed her EEO complaint on February 16, 2010. That means the  
17 relevant time period to establish conduct comprising her hostile work environment  
18 claim began 45 days prior to February 16, 2010, which is January 1, 2010.  
19 Accordingly, one act giving rise to her hostile work environment claim must have  
20 occurred sometime after January 1, 2010. The “Angels” letter, death threats,

1 incessant contact, letters, and other contact between Mr. Tice and Ms. Schmid that  
2 are alleged to support the Plaintiff's hostile work environment claim all occurred  
3 prior to January 1, 2010.

4 There is no allegation in the complaint, nor evidence in the record,  
5 supporting the occurrence of unwelcome verbal or physical conduct of a sexual  
6 nature that occurred on or after January 1, 2010. Accordingly, Ms. Schmid did not  
7 file her EEO complaint in a timely fashion as required by the administrative  
8 requirements, has not exhausted her administrative remedies, and cannot now  
9 pursue her Title VII claim for a hostile work environment. The claim must be  
10 dismissed.

### 11 **Federal Tort Claims Act**

12 Plaintiff alleges three tort claims against Defendants: (1) negligent  
13 supervision and retention; (2) negligent infliction of emotional distress; and (3)  
14 intentional infliction of emotional distress. Defendants argue that these claims  
15 must be dismissed because this Court lacks jurisdiction to hear them.

16 "The FTCA waives sovereign immunity for claims against the federal  
17 government arising from torts committed by federal employees." *Foster v. United*  
18 *States*, 522 F.3d 1071, 1074 (9th Cir. 2008) (citing 28 U.S.C. § 1346(b)(1)).  
19 However, claims under the FTCA are limited to those against the United States as  
20 a party. *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984).

1 “Individual agencies of the United States may not be sued.” *Id.* (citing *Evans v.*  
2 *United States Veterans Admin. Hosp.*, 391 F.2d 261, 262 (2d Cir. 1968) (per  
3 curiam)).

4 Defendants argue that they must be dismissed from this action because the  
5 only proper defendant to Plaintiff’s FTCA claims is the United States. In *Kennedy*  
6 *v. United States Postal Service*, 145 F.3d 1077 (9th Cir. 1998) (per curiam), the  
7 plaintiff sued the United States Postal Service and her supervisor in his official  
8 capacity alleging employment-related torts under the FTCA. The district court  
9 dismissed her claims because the FTCA does not allow suits against parties other  
10 than the United States. *Id.* at 1078. The Ninth Circuit affirmed that dismissal and  
11 stated unequivocally that “[b]ecause the plaintiff brought an FTCA action against a  
12 person and entity not subject to the FTCA, the district court properly dismissed the  
13 named defendants.” *Id.* Accordingly, the Court must dismiss the FTCA claims  
14 against the named Defendants for lack of jurisdiction.

15 Plaintiff argues that where the Attorney General of the United States was  
16 properly served, as is uncontested in the record here, ECF No. 2, the Court should  
17 substitute the United States as a defendant. Plaintiff relies on *Doe v. Hagee*, 473 F.  
18 Supp. 2d 989 (N.D. Cal. 2007), in support of her argument. The court in *Doe* did  
19 substitute the United States as a defendant in an FTCA case. *Id.* However, this  
20 Court does not need to determine whether substitution is the appropriate course of

1 action because the Court ultimately concludes that Ms. Schmid's claims fall within  
2 the so-called "discretionary function exception" to the FTCA's waiver of sovereign  
3 immunity. As a result, even with substitution this Court would lack jurisdiction,  
4 and such substitution would therefore be futile.

5 The waiver of sovereign immunity contained in the FTCA is limited by  
6 exceptions contained in 28 U.S.C. § 2680. Section 2680(a) establishes the  
7 "discretionary function exemption," which removes from the scope of the  
8 Government's waiver of sovereign immunity "[a]ny claim . . . based upon the  
9 exercise or performance or the failure to exercise or perform a discretionary  
10 function or duty on the part of a federal agency or an employee of the Government,  
11 whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

12 The purpose of the discretionary function exception is to prevent the second-  
13 guessing of agency decisions grounded in policy. *O'Toole v. United States*, 295  
14 F.3d 1029, 1033 (9th Cir. 2002) (quoting *United States v. S.A. Empresa de Viacao*  
15 *Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)). "In other  
16 words, 'if judicial review would encroach upon th[e] type of balancing done by an  
17 agency, then the [discretionary function] exception' applies." *Id.* (alteration in  
18 original) (quoting *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985)).

19 A two-step process controls whether the discretionary function exception  
20 applies. "First, the court must determine whether the challenged conduct involves

1 an element of judgment or choice.” *Nurse v. United States*, 226 F.3d 996, 1001  
2 (9th Cir. 2000) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).  
3 “Second, if the conduct involves some element of choice, the court must determine  
4 whether the conduct implements social, economic or political policy  
5 considerations.” *Id.* (citing *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir.  
6 1994)). While the burden is on Plaintiff to establish the existence of subject matter  
7 jurisdiction, once Plaintiff has facially pleaded claims that fall outside the  
8 exceptions of § 2680, it is up to the Government to show that one of the exceptions  
9 applies. *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992).

10 Plaintiff’s first amended complaint contains no allegations that any statute,  
11 regulation, or Corps policy commanded that Mr. Tice’s employment be terminated  
12 as a result of his behavior. Similarly, the record is devoid of any such statutes,  
13 regulations, or policies. Indeed, the record instead reveals many instances where  
14 no formal policy guides the decision. *E.g.* ECF No. 120 at 21 (“[A]t the time [of  
15 Mr. Tice’s June 26, 2009, return to the Walla Walla District Office] there was no  
16 policy or procedure in place to deal with workplace violence.”). In light of the  
17 fact that no statute or regulation restricts Corps decision making, the Corps’  
18 determination of how to handle Mr. Tice’s behavior involves an element of  
19 judgment or choice. *See Doe v. Holy See*, 557 F.3d 1066, 1084 (9th Cir. 2009).  
20 Therefore, the first step of the two-step process is met.

1 As to the second step, the Ninth Circuit has noted that “the decision of  
2 whether and how to retain and supervise an employee, as well as whether to warn  
3 about his dangerous proclivities, are the type of discretionary judgments that the  
4 exclusion<sup>[2]</sup> was designed to protect.” *Id.*; *see also Nurse v. United States*, 226  
5 F.3d 996, 1001-02 (9th Cir. 2000). As Ms. Schmid’s negligence claims all stem  
6 from the Corps’ supervision and retention of Mr. Tice, a simple application of the  
7 discretionary function exception would bar her claims.

8 Ms. Schmid argues that the application of the discretionary function  
9 exception to negligent supervision and retention claims is not so mechanical.  
10 Relying on the Eighth Circuit’s opinion in *Tonelli v. United States*, 60 F.3d 492  
11 (8th Cir. 1995), which the Ninth Circuit cited with approval in *Nurse*, 226 F.3d at  
12 1001-02, Ms. Schmid argues that the discretionary function exception applies only  
13 where large scale public policy issues are in play, i.e., where more than one  
14

---

15 <sup>2</sup>While *Holy See* addresses the discretionary function exclusion contained in  
16 the Foreign Sovereign Immunities Act (“FSIA”), the court noted that “[t]he  
17 language of the discretionary function exclusion closely parallels the language of a  
18 similar exclusion in the Federal Tort Claims Act,” and that the court would “look  
19 to case law on the FTCA when interpreting the FSIA’s discretionary function  
20 exclusion.” *Id.* at 1083.

1 person's employment is at issue. However, Ms. Schmid's argument is belied by  
2 *Tonelli* itself.

3 *Tonelli* involved a lawsuit against the United States by renters of a Post  
4 Office Box who discovered that their mail was being opened and resealed. 60 F.3d  
5 at 494. Although the plaintiffs reported the malfeasance, they were unable to  
6 immediately meet with the postmaster, and no immediate remedial action was  
7 taken. *Id.* After trying to meet with the postmaster twice, the plaintiffs ceased  
8 their complaints until approximately six months later. *Id.* The second round of  
9 complaints led to an investigation and, ultimately, a postal employee allegedly  
10 responsible for opening and taking some of the plaintiffs' mail resigned in lieu of  
11 termination. *Id.* The plaintiffs sued and alleged, among other things, claims for  
12 negligent hiring and negligent supervision and retention. *Id.* The trial court  
13 granted summary judgment for the United States on all claims. *Id.* The appellate  
14 court affirmed the dismissal of the negligent hiring claim based on the  
15 discretionary function exception but reversed the district court's dismissal of the  
16 supervision and retention claims. *Id.* at 496.

17 In affirming the dismissal of the negligent hiring claim, the appellate court  
18 did not rely on an overarching policy determination made by the post office as to  
19 all employees. Instead, the court noted that "[t]he post office's choice between  
20 several potential employees involves the weighing of individual backgrounds,

1 office diversity, experience, and employer intuition. These multi-factored choices  
2 require the balancing of competing objectives, and are of the ‘nature and quality  
3 that Congress intended to shield from tort liability.’” *Id.* (quoting *Varig Airlines*,  
4 467 U.S. at 813). *Tonelli* is in accord with the Ninth Circuit’s understanding that  
5 the discretionary function exception applies where the district court would need to  
6 engage in the same kind of policy balancing as agencies. *O’Toole*, 295 F.3d at  
7 1033. In short, *Tonelli* and the Ninth Circuit draw no distinction between decisions  
8 regarding a single employee or decisions about employee policies generally.

9 In addition to her single-employee, multi-employee argument, Ms. Schmid  
10 attempts to analogize *Tonelli* to the present case for the proposition that employee  
11 terminations based on illegal conduct are not subject to the discretionary function  
12 exception. As noted above, while the *Tonelli* court affirmed the district court’s  
13 dismissal of the negligent hiring claim, it reversed the district court as to the  
14 supervision and retention claims. 60 F.3d at 496. The court noted that while  
15 “supervision and retention generally involve the permissible exercise of policy  
16 judgment and fall within the discretionary function exception,” the action before  
17 the court “involve[d] allegations that the post office failed to act when it had notice  
18 of illegal behavior.” *Id.* The appellate court stated that “[f]ailure to act after notice  
19 of illegal action does not represent a choice based on plausible policy  
20 considerations.” *Id.* Stated another way, because there was no policy that could

1 plausibly support the post office's failure to respond to notice of illegal conduct,  
2 the post office's inaction could not have been the result of a deliberative policy  
3 choice, and court review would not encroach on appropriate agency policy  
4 authority.

5 *Tonelli's* illegal conduct rationale is limited. The *Tonelli* court relied on the  
6 fact that no response to illegal conduct had occurred at all. *Id.* The court did not  
7 address what level of response would have been appropriate. *See id.* Here, the  
8 Corps took a variety of responses to Mr. Tice's conduct, including barring him  
9 from the premises until he received mental health treatment, investigating his  
10 behavior, suspending him, and placing him at an off-site facility before ultimately  
11 bringing him back to Walla Walla. In the end, the Corps decided not to terminate  
12 Mr. Tice.

13 All of those decisions involve the balancing of various policy considerations  
14 including the risks of workplace violence, Ms. Schmid's safety, Mr. Tice's interest  
15 in his employment, and the Corps' policies towards workers with mental illnesses.  
16 In determining whether the Corps' behavior with regard to Mr. Tice constituted  
17 negligent supervision and retention, the Court and a finder of fact would  
18 necessarily encroach on the balancing done by the Corps. Therefore, Ms.  
19 Schmid's claim for negligent supervision and retention falls within the  
20

1 discretionary function exception to the FTCA, and this Court lacks subject matter  
2 jurisdiction over the claims.

3 While the allegations in Ms. Schmid's first amended complaint supporting  
4 her claims for negligent and intentional infliction of emotional distress are  
5 conclusory and do not reveal her specific factual theory of liability, it is clear from  
6 her memorandum opposing the Government's motion that the conduct comprising  
7 her emotional distress claims is of the same type as the conduct supporting her  
8 negligent supervision and retention claim. Accordingly, all of Ms. Schmid's  
9 FTCA claims are barred by the discretionary function exception. As such,  
10 substituting the United States for the improperly named defendants would be futile.  
11 Therefore, the Court dismisses Ms. Schmid's FTCA claims for lack of subject  
12 matter jurisdiction.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. The Defendants' motions to dismiss and for summary judgment, **ECF**

15 **No. 56, 64**, are **GRANTED**.

16 2. All of Plaintiff's Title VII claims are **DISMISSED WITH**

17 **PREJUDICE**.

18 3. All of Plaintiff's Federal Tort Claims Act claims are **DISMISSED** for  
19 lack of jurisdiction.

20 4. All other pending motions are hereby **DENIED AS MOOT**.

1 5. All court dates are hereby **STRICKEN**.

2 6. **JUDGMENT** shall be entered for Defendants.

3 **IT IS SO ORDERED.**

4 The District Court Clerk is hereby directed to enter this Order, to provide  
5 copies to counsel, and **CLOSE** this file.

6 **DATED** this 6<sup>th</sup> day of June 2013.

7  
8 *s/ Rosanna Malouf Peterson*  
9 ROSANNA MALOUF PETERSON  
Chief United States District Court Judge